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No. 79-504

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA AND
BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE
UNITED STATES, APPELLANTS

v.

STATE OF MISSISSIPPI

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY TO APPELLEE'S MOTION TO AFFIRM

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The purpose of this reply is to correct an error of fact appearing at page 50 of the Appellee's Motion to Affirm. There appellee asserts:

> The [three-judge district court below], in reaching its decision to attach little significance to a difference of three majority BVAP districts below 60%, evidently relied on a concession by the United States during the deposition of the Honorable Drews [*sic*] S. Days, Assistant Attorney General for Civil Rights, to the effect that a difference of three such "influence districts" in a 174-seat legislature does not represent a significant difference under Section 5.

Appellee offers, as authority for this statement, "Findings of Fact 36" (presumably, J.S. App. 13a). Appellee does not cite any page in the deposition of Assistant Attorney General Drew S. Days, III.

The district court did not, in "Findings of Fact 36" or elsewhere, advert to any "concession" by Mr. Days. In one portion of his deposition (Dep. 111-115),[1] Mr. Days was questioned about differences between plans in respect of the number of districts having a black majority in the voting age population (VAP); but Mr. Days did not there—or at any other point in his deposition—make the concession described by appellee.

When asked whether the fact, alone, that one plan had 31 majority black VAP district would make it "better" than a plan with 26, Mr. Days replied: "No, not necessarily. There are other factors that one would have to consider * * *" (Dep. 112). He was then asked (Dep. 114) whether, if all else were equal (*e.g.*, the districts had equal percentages of black voters, participation by black voters was equal, and the districts in both plans were equally compact and contiguous), the difference between 31 and 26 black VAP districts would be "significant enough to suggest a racially discriminatory purpose in a 122 member house?" He replied (Dep. 114-115):

> It's very significant. And that's all I can say. It's something that I think would be very important evidence in determining whether there was any indication of discriminatory purpose or a lack of discriminatory purpose.

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[1]This portion of the Days depositon is reprinted as an Appendix to this Reply.

Mr. Days' statement that a difference of five in the total number of black VAP districts would not "necessarily," standing alone, make one plan better than another does not amount to a concession that such a difference would be insignificant in cases where—as here black voter participation may vary from district to district depending on such factors as the urban or rural character of the population. And his answer that a difference between 31 black majority VAP districts in one plan and 26 in another would be significant evidence of racially discriminatory purpose is inconsistent with the concession regarding retrogression that appellee attributes to him.

CONCLUSION

The questions presented by this case are substantial and probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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[Page 111]

Q Now, let me hand you Days's exhibit six, and ask you if you can tell by looking at the demographics [Page 112] that are depicted on Days's exhibit six, whether or not the statutory plan reflected on there is abridges the right to vote on account of race?

A No, I cannot.

Q So you have to go to more than just how many districts exist and what percentage of black voters happen to be in those districts.

A Well, I'm saying several things. First, that I'm not prepared to conduct an on-the-spot analysis of your exhibit that I have not seen before.

Q Well, isn't that in the Section 5 submission, Days's exhibit six?

A I have not evaluated everything in the Section 5 submission. That's what I have staff to do.

Q Well, it doesn't make one plan, per se, better than another because one has got 31 black majority voting age population seats and another one has got 26, does it?

A Not necessarily.

Q That fact alone doesn't make one plan better than another in your eyes.

A No, not necessarily. There are other factors that one would have to consider, as I've indicated.

[Page 113]

Q As to why the difference.

A Well, why the difference, and also whether the differences in practical terms are significant. That is,

there might be a change in the number of so-called black voting age population districts, but if one looks behind that and looks at what in fact has gone on in those districts, what the history of those districts has been, what we know about block voting, what we know about registration, those figures could take on an increased or decreased significance.

Q All of the factors being equal in a 122 member legislature, do you believe the difference between 31 and 26 is significant?

A If there are 31 districts that have black voting age majority—

Q (Interposing) Majorities as opposed to 26.

A I would think, standing alone, that that might be an improvement, yes.

Q Thirty-one would be an improvement over 26.

A It's more than 26. Yes.

Q It's an improvement, but is it a significant all the factors being equal, is it a significant factor? Is it significant enough to suggest a racial [Page 114] discriminatory purpose on the part of the drafter?

A All other things being equal?

Q Yes.

A I think that one would have to conclude that by all other things being equal, do you mean that the districts are not carved up and they're compact and contiguous, and there's not wide deviations from one district to another?

Q By all things being equal, I mean that the quality from the black standpoint of the 26 is just as good as the quality from the standpoint of the 31. In other words,

the population is as good, the participation is good, the process is open—

A (Interposing) The lines are as good and so forth.

Q That's right. And all I'm talking about is that the difference between 31 and 26, is that significant enough to suggest a racially discriminatory purpose in a 122 member house?

A It's very significant. And that's all I can say. It's something that I think would be very important evidence in determining whether there was any indication of discriminatory purpose or a lack of [Page 115] discriminatory purpose.

Q Do you think it would be a piece of evidence, however, that would cut towards proving that there was a racially discriminatory purpose? In other words, it would tend to prove that there was a purpose to racially discriminate, as opposed to proving that there wasn't.

A You mean, if the legislature produced a plan that had 31 district voting age block—

Q (Interposing) No, if they produced a plan that had 26 black majority, when there was a possibility, a way they could have drawn it to get 31, do you think that that five seat difference is significant enough to suggest a purpose, you know, an improper purpose under Section 5?

A Standing alone, it is not, but it is a piece of evidence.

Q All right.

A I'm sorry I misunderstood your earlier question.

Q I am not the most precise questioner in the world, and you've done a good job answering me.

A I'm sorry.

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